No. 3007.

United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

The Western Union Telegraph Company, a Corporation,
Plaintiff in Error,
vs.
William Lange, Jr., and J. U. Hastings,
Defendants in Error.
and
William Lange, Jr., and J. U. Hastings,
Plaintiffs in Error,
vs.
The Western Union Telegraph Company, a Corporation,
Defendant in Error.

Brief for Plaintiffs in Error William Lange, Jr. and J. U. Hastings.

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STATEMENT OF THE CASE.

This case is before the Court on writs of error sued out by each of the parties to the action, who are

herein referred to, respectively, by their original designations. Judgment was rendered below in favor of plaintiffs for the principal amount of their demand, to-wit, $11,250.00, and they now seek to correct the action of the Court in refusing to include in the judgment interest thereon.

The action was brought to recover a loss suffered by plaintiffs through defendant's delay for three days in the transmission and delivery of a telegram sent by plaintiffs from Oakland, California, addressed to the Lyon County Bank at Yerington, Nevada. Said telegram was sent under a *special contract* by which defendant, *for an extra toll, insured its immediate transmission and delivery.* By it plaintiffs sought to intercept and prevent the payment of a draft in the sum of $11,250, which had been previously mailed by them to said bank for the purpose of meeting the second of certain seven installment payments under a contract then in force between themselves and Messrs. Pitt and Campbell. [Findings VII, VIII, Tr. pp. 47-52.] That contract provided for the deposit in escrow with said bank of the mining stock which was the subject-matter thereof, and contained the following clause:

"Third: And it is further agreed *that in the event of default* by said parties of the second part [the plaintiffs herein] in making any of the payments herein provided for, said *Lyon County Bank shall be authorized under the terms of such deposit in escrow, and it is hereby authorized,* to deliver all of the shares of stock so deposited with it pursuant hereto to said parties of the first part [Pitt and Campbell], *and that all payments theretofore made* by said parties of the

second part *shall be forfeited* to said parties of the first part, *and that thereupon all rights* of *each* of the said parties hereunder *shall forever cease and determine.*" [Finding IV, Tr. pp. 45-46.]

The lower Court, in overruling the demurrer to the complaint, held that this contract did not constitute an absolute contract of sale, but was one permitting the plaintiffs to withdraw therefrom by defaulting in any one payment and thereby rendering the contract no longer obligatory upon either of the parties. Judge Van Fleet, in the course of the oral opinion delivered at that time, said:

"I am satisfied that the contract out of which the controversy grows, while couched in terms which would *otherwise* give it the effect of an *absolute contract of sale* of the mining stock in question, *in view of the character of the forfeiture clause, cannot be given that construction.* That clause is *too definite and explicit* to leave any room for construction, or for the application of the general principle that ordinarily a forfeiture clause is for the benefit of the obligee and not the obligor. *In this instance the terms of the forfeiture clause are such that it would be a violation of the plain and obvious meaning of its language to hold that it did not apply to both parties to the contract;* that upon a failure, in other words, of the making of the future payments or any one of them therein provided the contract became at an end as to both parties and *no longer obligatory upon either. Of course, there is no reason why individuals are not to have the right to so contract, if they see fit.* In this instance I think they have

so contracted and that the general rule as applied in the case of Wilcoxson v. Stitt, 65 Cal. 596, and cases there referred to, cannot be held to apply to the more specific language of this clause."

The correctness of this construction of the Pitt and Campbell contract cannot, we believe, be successfully controverted.

Specifications of Error Relied Upon.

Plaintiffs have assigned as error [Tr. pp. 182-183] the failure of the lower Court to include, in the judgment rendered in their favor, *interest* on the amount of their claim either (a) from the date of its presentment to defendant (June 26th, 1907) or (b) from the date of the commencement of this action (April 28th, 1909).

BRIEF OF THE ARGUMENT.

Points of Law and Fact.

The points here made are:

1. That plaintiffs' claim was a *liquidated demand* arising on *contract;* that the value of the mining stock does not at all enter into the determination of the amount thereof; and hence that they are entitled to interest either from the date at which they presented their claim to defendant or from the commencement of this action.

2. That defendant, by proper investigation, *could have ascertained* that the mining stock was valueless, and therefore that the *amount* of plaintiffs' claim *was*

justly due, even if (contrary to our contention) such value be an element in fixing their loss; and that in such a case section 3287 of the Civil Code of California does not preclude the allowance of interest.

3. That defendant *repudiated all liability* on plaintiffs' claim and did not merely dispute the *amount* of an admitted liability; and that this course,—particularly in the face of plaintiffs' demand being for the *precise sum awarded them by the judgment* herein,—renders inapplicable the rule that an unliquidated claim does not bear interest until judgment, even were it possible (which we deny) to regard plaintiffs' demand as unliquidated.

4. That defendant, for an extra compensation, *insured* the immediate transmission and delivery of the delayed message; that this constituted a contract to pay plaintiffs, as indemnity, the amount of the draft, on a day certain, in the event that the message was delayed; and that one of the *implied* terms of such an agreement is the *obligation* on the insurer's part *to pay interest as damages* for its failure so to indemnify, whether the loss by such delay was or was not a liquidated sum.

I.

Plaintiffs' Was a Liquidated Demand for Breach of Contract; the Value of the Mining Stock Does Not Enter Into the Determination of the Amount Thereof; and Hence They Are Entitled to Interest.

Under the Pitt and Campbell contract, as construed by the lower Court, plaintiffs had the right at any time to avoid all further liability by defaulting in the payment of any one of the installments therein provided for. By so doing, they might cause "forever to cease and determine"—not only their own rights,—but also the reciprocal rights of Pitt and Campbell, and hence, of course, the correlative liability of themselves. Their telegram was sent pursuant to their election so to terminate the contract. Therefore, their loss, due to the failure of defendant to transmit to the bank their telegraphic instructions not to pay the draft originally designed by them for application on the Pitt and Campbell contract, is measured by *the amount of money which was paid contrary to their desire;* and no other element whatever enters into the determination of the amount of that loss. This is not a case wherein plaintiffs, having paid for and received an article not having an ascertainable value, sue for the difference between its value and the price paid as a result of defendant's failure to intercept their remittance. Such a state of facts would, of course, present a typical case of an unliquidated demand. On the contrary, *plaintiffs received nothing* under the Pitt and Campbell contract. When they determined to withdraw therefrom, they

had made an initial cash payment of $7,500 and had forwarded the draft in question to meet the second of the seven installments. On discovering that the mining stock was valueless, they endeavored to prevent the payment of that installment and thus to confine their loss to the original cash payment. This they were entitled to do, and for that purpose they contracted with defendant *immediately* to transmit and deliver their telegram,—*defendant* INSURING *such immediate transmission and delivery for an extra compensation.* [Findings X and XII, Tr. pp. 52-53, 56.] Defendant negligently delayed the transmission of the message for three days, with the result that defendant's loss on the Pitt and Campbell contract, instead of being restricted to $7,500, was increased by the amount of the draft, that is, to $18,750. Plaintiffs, of course, made no further payment under that contract. They forfeited the $18,750 [Findings XVII, Tr. p. 60; p. 103] and the Lyon County Bank, pursuant to the terms of the contract, was required to return the stock to Pitt and Campbell.

It is apparent, therefore, that the actual value of the Pitt and Campbell stock does not enter into the question of the determination of plaintiffs' loss. *They were not entitled to the stock unless they elected to make, and did make, full payment.* They were at liberty at any time to elect not to take the stock by failing to make further payment, and their withdrawal from the contract might be for any reason which to them seemed sufficient.

The Court found the stock to be in fact valueless. [Findings XVIII, Tr. p. 60.] But suppose the fact

were otherwise,—would plaintiffs' loss, by reason of defendant's failure to transmit and deliver the telegram in due season, have been reduced one cent? An answer in the affirmative would presuppose that plaintiffs received the stock under their contract,—which is contrary both to the fact and to the terms of the agreement.

Plaintiffs sought by their telegram,—not to take a step by which would be fixed only one of the terms of an equation for determining their loss,—but to put an end to further responsibility by defaulting in payment and thereby forfeiting $7,500 before the payment of their draft would increase the forfeiture they were bound to suffer to $18,750. Their loss was the amount of the draft,—not that amount less some other figure, definite or indefinite,—and it was so expressly found by the lower Court. [Finding XX, Tr. p. 61.] Eliminating the initial payment to Pitt and Campbell, the only inquiry necessary or permissible in order to determine the detriment to which they were subjected by "defendant's gross negligence in failing to transmit and deliver said message immediately, as by it agreed" [Finding XX, Tr. p. 61] is,—"What would have been plaintiff's loss if defendant had faithfully performed its contract for the immediate transmission and delivery of the telegram?" Plainly the answer is,—"There would have been *no* loss." The value of the mining stock is a wholly false quantity in the case. It was touched upon at the trial, but it has no legitimate place herein except as bearing upon the quality of the information on which plaintiffs acted in withdrawing from the Pitt and

Campbell contract and upon their good faith in so doing.

As plaintiffs were entitled to recover damages *certain in amount,* and as the right to the recovery thereof was vested in them at least as early as the date of the filing of their claim with defendant (June 26th, 1907), it follows that the lower Court should have included interest thereon in the judgment given in plaintiffs' favor. (Civil Code, Sec. 3287.)

We regret that we are unable to present to the Court in this connection any authority, precisely in point, illustrative of our contention. Search for such an authority has been in vain, and we can only surmise that our failure in this regard may be due to the fact that, by common understanding in the profession, such a demand as that here in question is conceded to be liquidated.

II.

Defendant, by Proper Investigation, Could Have Ascertained That the Mining Stock Was Valueless, and, Therefore, That the Amount of Plaintiffs' Claim Was Justly Due, Even if (Contrary to Our Contention) Such Value Be an Element in Fixing Their Loss; and, in Such a Case, Section 3287 of the Civil Code Does Not Preclude the Allowance of Interest.

Plaintiffs' claim for damages was filed with defendant on June 26th, 1907, some fifty-eight days after the delayed message was sent, and in that claim they stated *truly and correctly* the amount of their loss and all of

the facts out of which it arose. [Finding XIX, Tr. p. 60.] No investigation of those facts was made by defendant for a very considerable period. As counsel for defendant stated at the trial, the claim "lay dormant for a year or two." [Tr. p. 130.] Testimony by defendant's claims agent that he had made a report on this claim almost two years after it was filed, awoke evident surprise in the learned judge who presided at the trial, which lead to this colloquy:

"The Court: Can you explain why claims of this kind are permitted to run for years before they are taken up for investigation?

Mr. Hodghead: As a matter of fact, this investigation was delayed for a while after the claim was made." [Tr. p. 131.]

This is a bare statement of the fact,—not the explanation called for by the court,—and the significant feature of it is that the delay is in no wise connected with the difficulty or impossibility of ascertaining the value of the stock, or with any effort looking to such ascertainment. Defendant was "afforded every facility" by plaintiffs "to investigate this claim" [Tr. p. 130], but there is not one iota of evidence that any appraisal of the stock was ever secured. In fact, the possibility of escaping the consequences of their gross negligence by showing that the stock was of more value than the sum that remained unpaid thereon under the Pitt and Campbell contract was wholly an afterthought,—so much so that at the trial, counsel was quite unprepared with testimony upon the subject. [Tr. p. 155.] Under these circumstances, can it be said that the rule enun-

ciated in section 3287 of the Civil Code forbids the allowance of interest? We are confident that said section never was intended to apply (so as to preclude the granting of interest), to any case wherein the determination of the amount of liability *is not inherently impossible* without a judicial investigation, especially if the party in default *makes no effort to fix that amount by proper inquiry* as to values, cost, etc.

While we are by no means driven to the necessity of establishing this proposition in the present case, nevertheless the genesis of the code section in question, taken in connection with the authorities in jurisdictions wherein the rule has not been adopted by legislative enactment, indicates that said section was not intended as a departure from the law on this subject, as theretofore declared generally by the courts of this country, and that that law was and is in consonance with the proposition here advanced. Section 3287 is taken *verbatim* from section 1835 of the Field draft of the proposed New York Civil Code. The note appended thereto by the Field Commission was copied by the California Commissioners, and is, in part, as follows:

> "This seems to be the rule in actions for wrongful injuries * * * as it clearly is in actions upon contract. (Dana v. Fiedler, 12 N. Y. 40; Van Rensselaer v. Jewett, 2 N. Y. 136); * * *."

It is significant that in the second case cited by the Commissioners, it was held that interest was recoverable, as a matter of law, upon the rental there sued for, although it was payable in wheat and services the value of which was *unliquidated* by the contract. The court there said:

"Whenever a debtor is in default for not paying money, delivering property, or rendering services in pursuance of his contract, justice requires that he should indemnify the creditor for the wrong which has been done him; *and a just indemnity,* though it may sometimes be more, *can never be less, than the specified amount of money, or the value of the property or services at the time they should have been paid or rendered, with interest from the time of the default* until the obligation is discharged. And if the creditor is obliged to resort to the courts for redress, he ought, in *all* such cases, to recover interest, in addition to the debt, by way of damages. It is true that on an agreement like the one under consideration, the amount of the debt can only be ascertained *by an inquiry concerning the value* of the property and services. *But the value can be ascertained;* and when that has been done, *the creditor,* as a question of principle, *is just as plainly entitled to interest after the default, as he would be if the like sum had been payable in money.*"

2 N. Y. 140.

The courts of New York have never departed from the rule as enunciated in this case on which the code section in question was actually and avowedly based. Thus, in McCollum v. Seward, 62 N. Y. 316, it is said:

"The allowance of interest on the plaintiff's claim from the time of the commencement of the suit *although the amount was then unliquidated,* was proper within the recent authorities upon the subject." (Citing cases.)

62 N. Y. 318.

In Schmitt Bros. v. Boston Insurance Co., 81 N. Y. Supp. 767, interest was allowed on the amount of the recovery under an insurance policy payable sixty days after proof of loss. The court, after pointing out that, for all practical purposes, there was a total loss of plaintiff's property,—the value of which was in excess of the sum for which it was insured,—said:

> *"An honest appraisement would have at once disclosed this fact;* consequently, the defendant became obligated to pay at the expiration of the sixty days the sum secured to be paid by the policy. Such sum was demanded, and payment was refused. * * * As the extent of the amount which the defendant was required to pay *was easily ascertainable,* it must so far be regarded as a *liquidated* sum that, upon demand of payment when payable, interest was set running."
>
> 81 N. Y. Supp. 770.

In Braas v. Village of Springville, 91 N. Y. Supp. 599, plaintiff sued on a *quantum meruit* for the value of certain services. The whole evidence as to the value of the services *was directed to the payment of a specified sum* which the referee found was due at the commencement of the action. The court held that the plaintiff was entitled to interest, despite the fact that the sum had not been agreed upon between the parties and the amount actually determined satisfactorily between them. The court apparently took the position that the claim was a liquidated one because, at the trial, the prices named in an express contract for doing similar work, were adopted as the value of the labor and material for which recovery was sought in *quantum meruit.*

See also:

Loomis v. Gillett, 75 Conn. 298, 53 Atl. 581.

The case of New York etc. R. Co. v. Ansonia Land and Water Co., 72 Conn. 703, 46 Atl. 157, is illustrative of our proposition respecting the inapplicability of section 3287 of the Civil Code to cases in which, by due inquiry, values, cost, etc., etc., could be fixed and the amount of the liability of the party in default be by him ascertained. There action was brought by the railroad company for damages suffered by it through the washing out of its road-bed owing to defendant's negligence. The defendant denied *all* liability. The damages awarded included the cost of repairs, the expense incurred in the transportation of passengers and mail around the washout, and interest upon the cost of repairs from the several periods at which plaintiff was put to such cost. In sustaining the award of interest, the court, *per* Baldwin, J., said:

> "There is certainly an obligation to make payment, a breach of which places him in default, whenever he has knowledge *or means of knowledge* as to what amount is justly and reasonably due. In the case at bar the defendant had, from the first, the means of ascertaining what the repairs of the plaintiff's roadway would cost. * * * If it be the natural consequence of the injurious act, and, as in this case, its amount *could reasonably be ascertained by due inquiry and investigation, then,* whatever may be true under other circumstances, *the wrongdoer who neglects to ascertain it ought, in fairness, if it becomes necessary to sue for compensation, to be made to pay,* not only what was thus originally

> due, but also *damages for his delay in not paying it without judicial compulsion.* * * * Any civil engineer or railroad builder could have readily stated the approximate cost, and there is no claim that the precise outlay could not have been learned on inquiry from the plaintiff."
>
> 46 Atl. 157-158.

On the facts above set forth, it is evident that defendant, although promptly advised of all of the circumstances out of which arose plaintiffs' claim for damages, and although furnished "every facility" for investigation, wholly negected to make any proper effort to determine the value of the mining stock in question. The duty to make all possible inquiry in this regard was incumbent upon it,—the more so in view of its undertaking, for an *extra compensation,* to *insure* the immediate transmission and delivery of plaintiffs' message. The stipulation on the back of its message blank requiring claims for damages to be filed within sixty days, can only be sustained as a reasonable regulation on the theory that defendant, with its large and complicated operations, must be accorded an early opportunity to investigate, and determine the truth or falsity of, each claim; and this in turn imposes the duty on the defendant to avail itself of that opportunity or to suffer the consequences of its failure so to do. The authorities cited under this head of our argument amply sustain the proposition that, on the failure of defendant to investigate and ascertain the amount of plaintiffs' loss, it is chargeable with interest when it develops, on rendition of the judgment,

that plaintiffs claimed no more than was their just due.

III.

Even if Plaintiffs' Demand Could Possibly Be Regarded as Unliquidated (Which We Deny), Defendant's Repudiation of All Liability for Its Breach of Contract, in the Face of Plaintiffs' Claim for the Precise Sum Awarded Them by the Judgment Herein, Renders Inapplicable the Rule Disallowing Interest.

The rule denying interest in the case of unliquidated demands has been viewed, progressively, with less and less favor by the courts. In Bernhard v. Rochester German Ins. Co., 79 Conn. 388, 65 Atl. 134, the court says:

> "The purpose sought in awarding damages other than vindictive is to make a fair compensation to one who has suffered an injury. * * * Courts are more and more coming to recognize that a rule forbidding an allowance for interest upon unliquidated damages is one *well calculated to defeat that purpose in many cases,* and that *no right reason exists for drawing an arbitrary distinction between liquidated and unliquidated damages.* * * * There are actions to which the suggested rule is applicable. * * * Others, however, present conditions where without an allowance for interest, although the demand may be *unliquidated,* fair compensation for the injury done would not be accorded and justice thus denied. The determination of whether or no interest is to be recognized as a proper element of damage is one to be made in view of the de-

mands of justice rather than through the application of any arbitrary rule."

65 Atl. 137.

This passage is quoted with approval in 1 Sedgwick on Damages (9th Ed.), Sec. 315.

A similar attitude is displayed by the federal courts. In Southern Pacific Co. v. Arnett, 126 Fed. 75, the action was to recover a wholly unliquidated claim for breach of a contract to transport livestock with reasonable care. The court there said:

"Nothing less than the actual amount of the loss and interest thereon from the time it was demanded will fully compensate the shipper for the breach of the agreement, and he is entitled to full compensation. *The general rule is that the plaintiff is entitled to interest upon the damages which he sustains from a breach of a contract* and this case falls fairly within that rule."

126 Fed. 80.

In the case of Nashua etc. R. Corp. v. Boston etc. R. Corp., 61 Fed. 237, the Circuit Court of Appeals for the First Circuit considers at length the question of the allowance of interest in a suit for an accounting upon a joint traffic contract of the two railroads. The bill had been originally dismissed by the Circuit Court, but this decree was reversed by the Supreme Court, a portion of the claim made by the bill being disallowed and a portion allowed. The case was then sent to a master to take and state the account to which the complainant was entitled. The account being duly taken, the complainant claimed interest, either from

the dates when the various amounts were received by the respondent, or from the date of the filing of the bill; but interest was disallowed. The Circuit Court of Appeals modified the decree of the lower court by including interest from the date of the filing of the bill, and in so doing discussed at length (pages 246 to 252) the American and English authorities upon the question. The answer admitted that the sums in dispute had been received and alleged that the question was not about *amounts,* but merely as to the *right* to the sums named. It would be impossible to give any adequate extract from the very learned discussion of the authorities in this case, which, at the pages indicated, we particularly commend to this court's attention. The court, however, concludes its examination of the federal authorities as follows:

> "It will therefore appear that in all the cases which we have been able to find in the Supreme Court, within a period sufficiently late to be supposed to be in harmony with modern views touching the law of interest, interest has been uniformly allowed, with only three exceptions, the nature of which we will hereafter refer to. The latest case is Sturm v. Boker, 150 U. S. 312. * * *"

After pointing out that, in the case cited in the passage above quoted, the Supreme Court had applied "the broad equity that the prevailing party should recover interest from that date [of filing the bill] on whatever might be found due him," and that in this particular it had "reverted to the fundamental principles of justice

stated by it in the equity suit of Curtis v. Innerarity, 6 How. 146, the opinion proceeds as follows:

> "* * * Indeed, in the United States the active use of money is so general, the holding of it as a special deposit, so that there is no increment, is so rare, that to refuse a plaintiff or complainant interest on money unjustly detained does, ordinarily, a double injury,—it deprives him of the increase to which he was justly entitled, and it violates, in behalf of the defendant, a fundamental maxim of equity, by allowing him to take advantage of his own wrong."
>
> 61 Fed. 250-251.

It is to be noted in this case that the court gave interest only from the date of the filing of the bill, simply because prior to that time there had been no sufficiently specific demand to start the running of interest.

In Consaul v. Cummings, 222 U. S. 262 (likewise a bill for an accounting), the court cited and followed Nashua etc. R. R. Corp. v. Boston etc. R. R. Corp., *supra,* although what was due was uncertain,—only being ascertainable after numerous references in order to properly state the account,—and was not liquidated until the final decree. The court there said:

> "Interest is allowed by way of damages for failure to pay money when it is due, and frequently is not allowed except from the time the amount to be paid has been definitely ascertained. But there are many cases in which interest is charged from a prior date. Here the defendant at first promised to make a statement, then contended, without substantial support, that the part-

> nership was dissolved because Edmonds had transferred his interest in the fees. He resisted the accounting, failed to produce books, vouchers and statements proper to be kept by a surviving partner. As the Court of Appeals said, the delay and difficulty in reaching a conclusion was largely due to his failure to keep proper books. Under the circumstances the master properly allowed interest from the date the bill was filed."
>
> *222* U. S. *272-273.*

This case is particularly in point, as sustaining our proposition that peculiar circumstances in the situation and attitude of the person from whom a claim is due, sometimes render inapplicable the rule disallowing interest on unliquidated demands. See, also, in this connection, Spalding v. Mason, 161 U. S. 375, 395.

In California, we have an express statutory enactment which, to a certain extent, puts the matter beyond the reach of judicial construction. By section 3287 of the Civil Code, it is provided:

> "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, * * *."

But even in California doubt has been expressed whether interest should *always* be disallowed on unliquidated demands. Thus in Cox v. McLaughlin, 76 Cal. 60, the court says:

> *"We are not prepared to say,* in general terms, *that no interest in any case can be recovered in*

> *an action upon contract for an unliquidated demand.* * * * in this state interest is allowable on such demand *under some circumstances.*"
>
> 76 Cal. 71.

In Mix v. Miller, 57 Cal. 356, it was held that, under section 3287 of the Civil Code, a plaintiff was entitled to interest in an action to recover the *reasonable value* of services for making a search and abstract of title, and for money expended for traveling expenses, stationery, board and assistants, from the day that his demand became due,—that is to say, from the date of the completion of the work. This was plainly an unliquidated demand, yet interest was allowed, the court citing section 3287 of the Civil Code. This case was cited in Cox v. McLaughlin, *supra,* in connection with the passage above quoted.

If construed as denying interest in every case of a demand not strictly liquidated, the rule laid down in section 3287 of the Civil Code would be an extremely harsh one, as is indicated in the passage above quoted from Bernhard v. Rochester German Insurance Co., 79 Conn. 388, 65 Atl. 134. Moreover, a rule disallowing interest in all such cases places a premium on the recalcitrancy of the person from whom the claim is due.

The basis for the rule is thus indicated in Cox v. McLaughlin, *supra:*

> "The reason of such denial of interest is said to be that the person liable *does not know what sum he owes, and therefore can be in no default* for not paying."
>
> 76 Cal. 67.

"When the reason of a rule ceases, so should the rule itself." (Civil Code, Sec. 3510.) Where the debtor's failure to settle is, *in truth and in fact,* based upon his inability to determine the *amount* justly due from him, and he shows this to be so by an effort to adjust that amount as between himself and the claimant, the rule denying interest,—so long as it remains upon the statute books,—should be applied. He then is not in default because, while admitting a liability, "he does not know what sum he owes." But where the person upon whom the claim is made, instead of admitting responsibility and discussing the amount of loss, *denies* all responsibility, the reason for the ruling does not exist. He takes it upon himself *to decide that he owes nothing.* He assumes to *know.* He is not withheld from making a tender because he cannot determine the *amount* of his liability. On the contrary, he denies *all* responsibility and is determined to resist any payment whatever. Should *he* be shown the tender regard accorded to the man who admits a just liability, but who honestly differs from the claimant as to the amount thereof? If so, not only does the claimant suffer by being deprived during the period of litigation, without compensation, of the use of the money justly due him, but a *direct inducement* is offered every person from whom a demand is owing *to abstain from adjusting and paying the amount thereof,* in order that he may have the use, during that period, of the money which he must ultimately pay. Such a holding would be subversive of the policy of the law to encourage the private settlement of differences. At the time of

judgment, he will, by its terms, be required to pay no more than, in fair dealing, he should have paid at the time the claim arose,—perhaps years before.

This circumstance was pointed out forcibly in the dissenting opinion of O'Brien, J., in the case of Gray v. Central Railroad Co., 157 N. Y. 483, where he says:

> "The defendant has had the use of the money which it was bound to pay to the plaintiffs in satisfaction of the contract for nearly thirty years, and at the end of this long period it has been held that it is not bound to pay the plaintiffs any more than at the day of the breach. The ancient rule, long since repudiated, that interest cannot be allowed upon unliquidated demands, when applied to a case like this, *simply sets a premium on injustice. It encourages litigation,* since the party in default upon his contract may *always* contest the claim *without any liability to have it increased* by the lapse of time, and all this upon the *pretense that there was no way in which he could find out how much he ought to pay* his neighbor for a violation of his contract."
>
> 157 N. Y. 492.

Particularly apparent is the absence of the reason for the rule disallowing interest when defendant denies all liability *and* the award that is by the judgment made to the claimant, is *precisely the sum by him named in his demand.* Then, surely, the defendant is in no position to plead his ignorance of the amount due him in order to escape liability. The event proves the demand to have been a just one which he should have paid, but which he refused to pay either in whole or in part.

He who denies a liability *in toto* puts himself in default if, by the judgment, it be proven that in law the liability existed and that it was for an amount accurately measured by the demand; and he should not be permitted to assume a dual role by first *repudiating* responsibility, and, when that responsibility is fastened on him, by then claiming exemption from the payment of interest on the ground that he could not be in default *since he did not know what sum he owed.* In 1 Sedgwick on Damages (9th Ed.), Sec. 314, it is said:

> "In some cases it has been held that interest runs from the time the plaintiff demanded a settlement, i. e., when the demand is reasonable and puts the defendant in default. Thus in Pennsylvania, in Gray v. Van Amringe [2 W. & S. 128], the court held a demand sufficient to entitle the plaintiff to interest. The action was for services rendered. An account had been presented but payment had been refused, on the ground that the charges were excessive. The plaintiff recovered the full amount demanded. In delivering the opinion of the court, Kennedy, J., said: 'In a case, therefore, where the plaintiff has performed work, labor, and services of any kind, * * * and after having performed the same, *demands of the defendant what shall be deemed afterwards, by a court and jury, a reasonable compensation, which the latter refuses to pay,* it would seem to be just that the plaintiff should recover interest on the amount so demanded, from the time of the demand.'
>
> "A demand, not for an accounting and agreement on the amount due, but a sum as-

> sumed by the plaintiff to be due, is sometimes said to be enough to put the defendant in default if the sum is a reasonable one. So where an attorney presents a bill for his services, the charges being found to have been reasonable, interest is allowed from the presentment of the bill. *This may be supported, upon the ground that it is really a proper demand for a settlement.*"

The amount awarded plaintiffs herein was the identical sum claimed by them in their written demand on defendant, which demand—so far as regards any action looking to its settlement in whole or in part,—was totally ignored by defendant. Where there is a duty incumbent upon the person liable, to liquidate a claim, his repudiation of liability and his refusal to liquidate entitle the claimant to interest from the date of such repudiation and refusal. Thus in Bernard v. Rochester German Insurance Company, 79 Conn. 388, 65 Atl. 134, it was held proper to include interest upon the amounts which the policies of insurance in suit obligated the defendant to pay, from the time it refused recognition of any liability and put an end to the prescribed process of adjustment,—the court saying:

> "* * * by such inclusion only could the court compensate the plaintiff for what he had suffered by reason of the delay resulting from the defendant's wrongful act."
>
> 65 Atl. 137.

And note the passage from this opinion quoted at the beginning of subdivision "III" of this brief.

See, generally, 1 Sedgwick on Damages (9th Ed.), Secs. 312-315.

In White v. Miller, 78 N. Y. 393, the court said:

> "* * * where an account for services, or for goods sold and delivered, which has become due and is payable in money, *although not strictly liquidated,* is presented to the debtor and payment demanded, *the debtor is put in default and interest is set running;* * * *."
>
> 78 N. Y. 399.

Again, in City of Louisville v. Henderson's Trustee, 13 S. W. 111 (Ky.), it is said:

> *"The judgment allowing the entire claim* establishes the fact that the city *has been a delinquent debtor.* The creditor has been kept out of his money. The city has had the use and benefit of the work and improvement, and, while it may not have intended to harass its creditor by vexatious defense to the suit, yet *interest is given to compensate the creditor,* and not to punish the debtor; and, when it denied the quantity of work done under a contract fixing the time of payment, and the price, *it took the risk of the issue thus made by it being determined against it.* If, in such a case, a creditor, after the lapse of years of litigation, is not entitled to interest, then he will, in effect, lose a part of his debt. He would be kept out of the use of his money; the debtor, in the meantime, getting the benefit of it. The latter would, in effect, pay but a part of his debt. * * * Indeed, he might unjustly thus delay payment until the use of the money would equal the entire debt, and thus, in effect, be out nothing. Even if the amount be in dispute, yet, if it be

finally determined that the defendant in fact owed it, and that it ought to have been paid at a particular time, he cannot complain, with good grace, if he be made to pay interest, because he has had the use of money to which his creditor was entitled. Thus, it will hardly be contended that, if a policy of insurance be payable 60 days after proof of loss, the insured would not be entitled to interest from that time, although the amount of the loss might be disputed, and therefore not definitely known for years, *if the claim were finally made good by judgment.*"

13 S. W. 112.

See also:

Schmidt v. Louisville etc. Ry. Co., 95 Ky. 289, 26 S. W. 547.

The case of Western Union Telegraph Co. v. Carver, 15 Tex. Civ App. 547, 39 S. W. 1021, is particularly in point because it upholds the allowance of interest on damages suffered by reason of the failure of the telegraph company to deliver a message. Damage in the principal sum of $1,000 was found by the jury,—the measure thereof being the difference between the prices in the message offered for certain cattle and the prices at which the same could have been purchased at the date when it was learned by the sender of the message that it had not been delivered. The court there said:

"Here the jury found that at the date of the institution of the suit the defendant should have paid to the plaintiff the sum of $1,000. After that time, at least, *in violation of its duty,* it withheld

> that amount of money from the appellee. By way of indemnity to the latter on account of the detention of his money, it would seem that legal interest should be allowed."
>
> 39 S. W. 1022.

In the recent case of Fairchild v. Bay Point etc. Ry. Co., 22 Cal. App. 328, the court goes farther than is required in the case at bar. The contract there sued on provided that certain work should be compensated for by reimbursing to plaintiffs its cost and adding ten per cent thereto. Respecting interest on the demand, the court said:

> "Nor would the fact that the defendant *denied the amount* of the cost charged against it, *if the court found against defendant's contention,* deprive the plaintiff of the right to recover interest."
>
> 22 Cal. App. 331.

We submit, therefore, that the rule denying interest on unliquidated demands has no application to cases in which, before action brought, defendant makes no question respecting the *amount* of the demand, but on the contrary *denies all liability.* And this is particularly true when the amount specified by the claimant is, by the judgment, declared to have been justly due at the time demand was made. In the case at bar, the inquiries then become pertinent,—"What was defendant's attitude toward the demand here in question? What treatment did it accord plaintiffs' claim for damages? Did it deny *all* responsibility, or did it merely dispute the *amount* of an admitted liability?"

A. *Facts indicative of defendant's denial of all responsibility as a matter of law.*

The message sent by plaintiffs was not an ordinary message. It was a message which on its face showed its importance and the need for haste. [Finding VIII, Tr. p. 49.] In addition, plaintiffs fully explained to defendant's agent, at the time of sending it, all of the circumstances and the necessity for promptness. They placed themselves wholly in defendant's hands with respect to the method in which said message should be sent, and adopted the method of transmission suggested to them by defendant. [Findings VIII and XII, Tr. pp. 49-52, 56; pp. 97-98.] They paid an *extra sum* beyond the ordinary tolls for such a message, to secure, and to have *insured* to them by defendant, the immediate transmission and delivery which they sought. [Finding X, Tr. pp. 52-53.] They made repeated inquiries, after the message was sent, whether it had been delivered promptly, and they were assured that it had "gone out on time but had not been repeated." [Tr. pp. 82, 106.] They made their claim for loss upon defendant on June 26th, 1907, within sixty days as required by the stipulation on the back of the message blank, and in that claim they stated the amount of loss and all of the facts out of which it arose. [Finding XIX, Tr. p. 60.] No attention was paid thereto until February 26, 1909, and then nothing was done except that the defendant's agent attempted to demonstrate to plaintiffs' attorney that the message had not gone to Tonopah or Goldfield, as he had been previously advised. [Tr. pp. 96, 108, 126-

127.] In other words, defendant sought to justify itself. Defendant had not in its possession, at that or any other time, the Wabuska relay of the message (Wabuska being the terminus of defendant's line for Yerington messages),—a circumstance conclusive, not only of the *fact* that the message had not been transmitted by defendant to such terminus either on the night of April 29th or the morning of April 30th, but also of its *knowledge* of that fact. [Tr. pp. 127-129; Finding XV, Tr. p. 58.] And yet, despite these circumstances, showing both that defendant was liable for its failure to transmit and deliver the message and that it must have been aware of its liability, plaintiffs never received word of any action on their claim. Defendant did not *admit* a liability and then attempt to adjust the *amount of loss* which plaintiffs had suffered. In its answer herein, it repudiated all responsibility (1) by denying any special contract with, or the payment of an extra toll by, plaintiffs, (2) by taking refuge behind the stipulations on the message blank, and (3) by endeavoring to shift responsibility to the connecting telephone company. [Tr. pp. 29-32, 34-35, 36.]

And all this in the face of its effort to have plaintiffs authorize the application of the extra telegraph tolls paid by them, to the tracing of the delayed message [Tr. pp. 82, 106], with a plain purpose to evade a responsibility that had already fastened upon it. Never did defendant, by a single act or word, admit responsibility for *any* loss suffered by plaintiffs and thereupon take the position that the loss, though suffered,

was less in amount than plaintiffs' claim. In litigation arising out of the failure of telegraph companies to perform the service for which they were employed, it is usual to find the tender by defendant in its answer of the amount of tolls paid by the sender of the message. No such tender was made in the pleadings here, defendant's position throughout being that it had done everything for which it had been paid. [Answer, Tr. pp. 24-41.]

In other words, the defendant denied all responsibility to the plaintiffs, in the face of their demand (which contained a statement of all the information in their possession bearing upon the controversy), and notwithstanding their effort to aid defendant to supplement that information, by addressing a letter to all persons likely to be able to throw any light on the matter, asking them to assist its investigation. [Tr. pp. 107-108.] Mr. Harrington, defendant's claims agent, testified: "I was afforded every facility by Mr. Poorman to investigate this claim." [Tr. p. 130.] Values and the amount of plaintiffs' loss never were discussed between the parties. Defendant stood flat-footedly upon the proposition that it was under *no* responsibility, and at the trial introduced no evidence of values but only the testimony of one of the owners of the stock that, *in his opinion,* the same was more valuable than the amount that remained payable under the Pitt and Campbell contract after the application of the draft thereon. The court found, contrary to this opinion evidence, that the stock was practically valueless. [Finding XVIII, Tr. p. 60.]

The record, we submit, demonstrates that this is a case,—not where defendant was in ignorance, as a matter of *fact,* of the *quantum* of its liability,—but where defendant, as a matter of *law,* denied *all* responsibility. Ignorance of the law is no excuse; and when defendant seeks to justify itself *in point of law alone,* it hardly lies in its mouth to claim an exemption from the payment of interest upon the ground that the demand, being unliquidated in point of *fact,* defendant could not know what sum it owed plaintiffs.

And as for its investigation, on which must have rested the denial of its legal responsibility, what is to be said of defendant's failure to make inquiry at Tonopah and Goldfield when advised by plaintiff's counsel that the Oakland operator had told him the message had been erroneously sent to one or the other of those two points? [Tr. pp. 126-127, 130-131, 106-107.] Is not this indicative either of inexcusabe neglect by defendant *to avail itself of an avenue of information* that would probably have settled (even to its own conviction) its legal responsibility, or else of a recalcitrant spirit *determined on resistance of any demand, however just?*

IV.

Defendant, for an Extra Compensation, Insured the Immediate Transmission and Delivery of the Delayed Message. This Constituted a Contract to Pay Plaintiffs, as Indemnity, the Amount of the Draft, on a Day Certain, in the Event That the Message Was Delayed; and One of the Implied Terms of Such an Agreement Is the Obligation on the Insurer's Part to Pay Interest as Damages for Its Failure So to Indemnify, Whether the Loss by Such Delay Was or Was Not a Liquidated Sum.

The rule denying interest in the case of liquidated damages is, of course, one which governs only in the absence of any agreement, express or implied, between the parties for the payment of interest. If the parties see fit to contract for the payment of interest, even on a sum that must remain unliquidated until ascertained by the judgment, there is no legal principle that forbids the enforcement of such an agreement.

It will be remembered that defendant, by a *special contract* and for an *extra* compensation beyond the ordinary telegraphic tolls, INSURED the immediate transmission and delivery of plaintiffs' message so that it would answer their purpose of intercepting and preventing the payment of the draft. Such an undertaking is one to indemnify plaintiffs for the consequences of the nonperformance of defendant's undertaking, and the obligation to pay such indemnity arises perhaps as early as defendant's failure, but certainly not later than the presentment by plaintiffs of their

claim for that indemnity. In such case, there is implied in defendant's contract a stipulation to pay interest as damages for delay in discharging the claim for indemnity, if there be such delay. This is distinctly held in the case of Curtis v. Innerarity, 6 How. 146, where it is said:

> "It is a dictate of natural justice, and the law of every civilized country, that a man is bound in equity not only to perform his engagements, but also to repair all the damages that accrue naturally from their breach. Hence, every nation, whether governed by the civil or common law, has established a certain common measure of reparation for the detention of money not paid according to contract, which is usually calculated at a certain and legal rate of interest. Every one who contracts to pay money on a certain day knows that if he fails to fulfill his contract he must pay the established rate of interest as damages for his non-performance. Hence, it may correctly be said that such is the implied contract of the parties. See 2 Fonblanque, Eq., 423; 1 Domat, book 3, tit. 5."
>
> 6 How. 154.

We do not by any means consider that we are here required to combat either the general rule denying interest on unliquidated demands, or the application of that rule to cases in which the difference between the parties is one of *liability or non-liability,* instead merely of one respecting the *amount* of an *admitted* liability. We stand upon the absolutely unquestioned ground that plaintiffs' was a liquidated demand, and

that the only question ever open to dispute between the parties, was whether the defendant was originally liable for $11,250.00 or for nothing. This was the amount of the draft paid contrary to plaintiffs' wishes, as expressed in the delayed telegram, and it was so paid through defendant's failure *promptly* to transmit and deliver that message under a *special contract* by which defendant, *for a special consideration, insured promptness.* Plaintiffs received nothing whatever under the Pitt and Campbell contract,—in fact, *could* receive nothing except on full payment thereunder,—and, by its terms and in fact, they forfeited everything they had paid thereon. *Their loss was exactly the amount of the draft,* and not even a computation was required to determine the same. No question of offset as against that loss is present in the case, *since no benefit*—liquidated or unliquidated,—*accrued to plaintiffs.* We submit, therefore, that plaintiffs are entitled to interest upon their demand from the date of filing their claim in writing with defendant, at the rate of seven per cent per annum. This is their due, both under section 3287 of the Civil Code, and also under that rule of law by which is raised in defendant an implied promise to pay interest.

Plaintiffs' assignment of errors herein is in the alternative, being for the failure of the court to allow interest from the date last named, and being also for the failure of the court to allow interest from the date of the commencement of this action (April 28th, 1909). [Tr. pp. 182-183, 19.] This course was adopted in view of certain of the cases (e. g., McFadden v. Crawford, 39 Cal. 662), which allow interest from the

latter, rather than the former, date. The reason in favor of the allowance of interest from the commencement of the action would seem to apply with equal force to the allowance of interest from the date of the demand, since such commencement merely constitutes a demand in cases where a demand is requisite. (Sedgwick on Damages [9th Ed.], 314, citing White v. Miller, 78 N. Y. 393, and McMaster v. State, 108 N. Y. 542.)

For the foregoing reasons, it is respectfully insisted that the judgment herein is erroneous, and that the same should be modified by the inclusion therein of interest on $11,250.00, the principal of plaintiffs' demand, from June 26th, 1907 (or, at least, from the commencement of this action.)

Respectfully submitted,

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